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10/759,585	01/15/2004	Gary Wayne Bagnall	37370-32	7985
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Mitchell, Silberberg & Knupp, LLP 11377 West Olympic Boulevard Los Angeles, CA 90064			EXAMINER ROWAN, KURT C	
			ART UNIT 3643	PAPER NUMBER
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/759,585  
Filing Date: January 15, 2004  
Appellant(s): BAGNALL ET AL.

**MAILED**

JUL 06 2007

**GROUP 3600**

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Joseph Swan  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed Feb. 26, 2007 appealing from the Office action mailed January 30, 2006.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

5274949	BEATON	1/4/1994
5363589	FLYNN	11/15/1994

### **(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claims 2 and 13 are rejected under 35 USC 102(b) as being anticipated by Beaton.

Claims 3, 7, 10, 20-23 are rejected under 35 USC 103(a) as being unpatentable over Beaton.

Claims 1, 4, 5, 6, 8, 9, 11, 12, 14-16, 18-19 are rejected under 35 USC 103(a) as being unpatentable over Beaton in view of Flynn.

### **(10) Response to Argument**

Applicant argues that Beaton has an inner wall of the upper section of the side walls that is not more than *de minimis* reflective. However, applicant has not provided an objective standard in the specification as to what constitutes reflective means. The transparent inner wall of Beaton is reflective since it can be seen such as in Figures 3-4. The fact that Beaton characterizes the inner wall as transparent or clear does not mean that it does not reflect light. The clear plastic disc 27 of Beaton can be considered as a cover since it has the structure capable of performing the intended use. The hole in the cover would preclude insects from escaping if they were larger than the opening in the disc. The claim does not state where the cover is located when the upper section of the trap is connected to the lower section of the trap. In reference to claim 7, Beaton shows an insect attracting light 28 and applicant argues that there is no teaching in Beaton (not disclosed to be ultraviolet) to provide an ultraviolet light (which is old and well known in the art). In response to applicant's argument that there is no suggestion to combine the reference to Beaton with an old and well known ultraviolet

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light source, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the knowledge is generally available to one of ordinary skill in the art since ultraviolet lights are known insect attractors. Applicant states that Beaton presumably would have mentioned the use of an ultraviolet light, but this is not the case since patents are concerned with the current differences between the prior art and the instant invention, not with what is old and well known in the art. In reference to claim 10, in response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In response to claim 20, applicant argues that Beaton does not show that the openings cover 30-40% of the total area of the side walls and states that there is no suggestion in the Beaton reference for one to experiment. However, routine experimentation is known to one of ordinary skill in the art to optimize the operation of the trap such as sizes and colors to attract different insects and insects

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of different sizes. See *In re Aller et al.*, 105 USPQ 233. Hence, one skilled in the art would be lead to engage in routine experimentation to find the optimum size of the trap, the optimum size of the openings of the trap and the optimum colors for the trap.

Accordingly, claim 20 is not believed to be allowable over the prior art. In reference to claim 3, the same rational applies. In reference to claim 1, applicant argues that nothing in Flynn indicates that the upper portion 30 and the lower portion 32 are different funnels. However, see Fig. 1 which shows funnel 30 as a screen and funnel 32 as a solid which indicate that they are different elements. Also, Fig. 2 shows funnel 30 and funnel 32 at substantially different vertical angles. See column 3, lines 32-50 which states that funnel 30 or upper portion 30 has angle of about 15 degrees and the lower funnel 32 or lower portion 32 has an angle of about 35 degrees. This section also describes them as two different elements. Inherently, the two funnel sections are separable and therefor one funnel section is removable from the other. Hence the combination suggests this feature of the invention and a *prima facie* case for obviousness has been met.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

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Respectfully submitted,



KURT ROWAN  
PRIMARY EXAMINER  
GROUP 3200

Kurt Rowan

Conferees:

Jeff Gellner /Jeffrey L. Gellner/ Jeffrey L. Gellner

Frank Palo *Frank Palo*